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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ELUID LIRA, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Jones County
No. 11-20-00148-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

John R. Messinger
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705
P.O. Box 13046
Austin, Texas 78711
512/463-1660 (Telephone)
512/463-5724 (Fax)
information@spa.texas.gov

NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Eluid Lira.

*The case was tried before the Honorable Brooks H. Hagler, Presiding Judge, 259th District Court, Jones County, Texas.

*Counsel for Appellant in the trial court was Michael Mark, State Counsel for Offenders, P.O. Box 4005, Huntsville, Texas 77342-4005.

*Counsel for Appellant on appeal was John Moncure, State Counsel for Offenders, P.O. Box 4005, Huntsville, Texas 77342-4005.

*Counsel for the State at trial was Deborah Dictson, Special Prosecution Unit, 100 Chestnut Street, Ste. 107, Abilene, Texas 79602.

*Counsel for the State on appeal was Melinda Fletcher, Special Prosecution Unit P.O. Box 1744, Amarillo, Texas 79105.

*Counsel for the State before this Court is John R. Messinger, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ELUID LIRA, Appellant

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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Over objection, the trial court conducted appellant's negotiated-plea hearing via Zoom because it presented less risk of transmission of COVID-19 than would transporting him from the penitentiary to the open courthouse and back. An Emergency Order from the Supreme Court encouraging this decision justified the procedure unless the right to appear in court to get what you want is "substantive" and thus immune to modification in times of emergency.

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument. Crafting a test to distinguish procedure from substance may be more difficult than it sounds, and giving the parties an opportunity to address the Court's concerns before submission would help.

STATEMENT OF THE CASE

Appellant pleaded guilty to assault on a public servant and was punished according to his plea agreement. He reserved the right to complain that his right to accept this agreement in person was violated. The court of appeals reversed and remanded, presumably for appellant to enter the same plea for the same punishment in person.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed in an unpublished opinion.[1] No motion for rehearing was filed. The State's petition is due April 12, 2021.

GROUND FOR REVIEW

If a defendant has to accept the benefit of a negotiated plea agreement via videoconferencing, has he lost a substantive right or been harmed?

ARGUMENT AND AUTHORITIES

I. Emergencies can justify suspension or modification of procedures.

In the last year, the Texas Supreme Court issued numerous orders pursuant to its authority to "modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the

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[1] *Lira v. State*, No. 11-20-00148-CR, 2021 WL 924893 (Tex. App.—Eastland Mar. 11, 2021) (not designated for publication). The court also reversed in a companion case on the same issue. *Huddleston v. State*, No. 11-20-00149-CR, 2021 WL 924850 (Tex. App.—Eastland Mar. 11, 2021). A petition in that case was also filed this day.

governor[,]"[2] in this case COVID-19. The relevant order in this case permitted courts (or required them, if necessary for safety) to "modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order" "without a participant's consent."[3] It specifically authorized courts to "[a]llow or require anyone involved in any hearing . . . to participate remotely, such as by teleconferencing, videoconferencing, or other means[,]" again, without the participant's consent.[4]

The threshold question is whether this aspect of the order affects substantive rights or mere procedural ones. As this Court recently said in *In re State ex rel. Ogg*, "Both the statute and the order address procedural matters"; neither "purport to authorize courts to modify substantive rights."[5] This Court held that neither could be used to "confer upon the trial court the authority to conduct a bench trial without the State's consent."[6] Eight days later, the Eleventh Court of Appeals held that violation of the statutory right to accept a plea bargain in person (rather than by Zoom) led to the same result as in *Ogg*: an absence of authority to hold the proceeding.

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2 TEX. GOV'T CODE § 22.0035(b).

3 *Seventeenth Emergency Order Regarding COVID-19 State of Disaster*, 609 S.W.3d 119, 120 (Tex. 2020) (Part 3.a.).

4 *Id*. (Part 3.c.).

5 WR-91,936-01, __ S.W.3d __, 2021 WL 800761, at *3 (Tex. Crim. App. Mar. 3, 2021) (orig. proceeding). The same order is at issue in both cases.

6 *Id*. at *4. *See* TEX. CODE CRIM. PROC. art. 1.13(a) (permitting defendants to waive jury trial in non-capital cases "with the consent and approval of . . . the attorney representing the state.").

II. The right at issue is a narrow one.

It is crucial to understand what right is at issue. The Code of Criminal Procedure recognizes that procedures surrounding pleas should be more flexible with defendants, like appellant, confined in penal institutions.[7] One modification is to allow the defendant to accept a plea by videoconference.[8] The only requirements are adequate technology, the ability of the defendant to privately consult with counsel on request, and consent by both parties.[9] Despite raising numerous claims pre-hearing,[10] appellant's sole complaint on appeal was having to participate via Zoom without consent. He has not made—and the record would not support—any claim that the courthouse from which the trial court conducted the hearing was not "open," that he could not privately consult with counsel, or that the technology was inadequate.[11] Nor has he made a constitutional claim that he had the right to accept his plea in person. The only right at issue is his statutory right to be physically present to get what he wanted.

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[7] TEX. CODE CRIM. PROC. art. 27.19.

[8] TEX. CODE CRIM. PROC. art. 27.19(a) (permitting procedures set out in Art. 27.18); TEX. CODE CRIM. PROC. art. 27.18(a) (permitting pleas and waivers subject to enumerated conditions).

[9] TEX. CODE CRIM. PROC. art. 27.18(a)(1-3).

[10] In addition to the statutory claim, appellant's motion covered the rights to an open court/public trial and effective assistance of counsel. 1 CR 10-16.

[11] The trial court made detailed oral findings of fact regarding the plea procedures. 1 RR 22-25.

III. This case is not like *Ogg*.

The court of appeals relied almost exclusively on *Ogg* when it declared the right at issue is substantive. It held that, as in *Ogg*, "the trial court was not authorized to accept Appellant's guilty plea" in the absence of the Art. 27.18 waiver, calling it a "statutory condition" that "was not met."[12] Review of *Ogg*'s reasoning shows the rights (and thus waivers) at issue are not comparable.

This Court decided *Ogg* on the basis that sometimes "a judge's lack of authority to preside over a proceeding can . . . invalidate the proceeding itself."[13] The case cited discussed judges who were disqualified or never qualified to sit.[14] That concept was expanded in *Ogg* to include situations in which the lack of authority related to "a particular type of proceeding."[15] After noting that a bench trial without the State's consent results in a nullity, at least for jeopardy purposes,[16] it called the notion that "a generically framed right to modify statutory deadlines and procedures" could authorize a trial court to deprive either party of a jury trial "absurd."[17] The substantive difference between a jury trial and a bench trial is obvious.

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[12] Slip op. at 4-5.

[13] 2021 WL 800761, at *3.

[14] *Id*. at *3 n.19 (citing *Davis v. State*, 956 S.W.2d 555, 557-58 (Tex. Crim. App. 1997)).

[15] *Id*. at *4.

[16] *Id*. (citing *Ex parte George*, 913 S.W.2d 523, 525-27 (Tex. Crim. App. 1995)).

[17] *Id*.

In this case, the only difference between the proceeding appellant wanted and the proceeding appellant got is that he was forced to get everything he bargained for over Zoom. This is not an "*Ogg*" case.

IV. Is the right substantive for some other reason?

Because of its identification of this case with *Ogg*, the court of appeals did not provide substantive analysis of why the right is substantive. It appears that court would hold that any right that must be waived is "substantive." That the Legislature saw fit to require waiver is undeniable. The waiver presumably has value, and would serve as consideration to support a bargain if such is required.[18] But does that mean that *any* statutory provision that requires waiver is a substantive right? Would mandatory language directed at the trial court suffice?[19] Or must the statute be waiver-only *and* affect the implementation of a substantive right? Elevating a statute due to its connection to a substantive right, however, would appear to be the sort of significance-by-proxy analysis this Court rejected in *Gray v. State*.[20] Is there a better way?

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[18] *See Carson v. State*, 559 S.W.3d 489, 494 (Tex. Crim. App. 2018) (declining to abandon the consideration requirement for waivers based, in part, on the easy applicability to the facts at hand).

[19] *See Proenza v. State*, 541 S.W.3d 786, 798 (Tex. Crim. App. 2017) (equating mandatory language directed at the judge with a right that must at least be waived).

[20] 159 S.W.3d 95, 97 (Tex. Crim. App. 2005) ("[M]any—perhaps most—statutes are designed to help ensure the protection of one constitutional right or another. Having such a purpose does not convert a statutory right into a one of federal constitutional dimension, much less a right whose violation is considered to be structural error.").

A meaningful test would not simply check for a waiver requirement (or its equivalent) or consider whether a statute is "substance adjacent." It would ask whether the right at issue could affect the substance of the proceeding rather than how it is conducted. Again, the statutory right at issue is narrow: a defendant's right to be physically present in court to receive the deal he bargained for. Viewed properly, appellant objected to an aspect of a plea proceeding that, because of other procedural safeguards, could not affect the outcome and so he still got the deal he bargained for. That is the hallmark of a procedural right. Ironically, had this been raised as a constitutional issue, it would have been framed as a matter of procedural (rather than substantive) due process and the analysis would have been the same: what would his physical presence add to the quality and reliability of the proceeding?[21] The answer is, "nothing."

V. If a substantive right was violated, it was harmless.

Assuming the court of appeals was right for the wrong reason, the opinion ended before harm was assessed. The court understandably did not consider harm because it equated the right at issue to that in *Ogg*, the violation of which resulted in

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[21] *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."). Note that this test is often satisfied when a defendant is completely absent from a proceeding. *Id*. at 747 (exclusion from his competency hearing did not violate due process rights); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (no violation in exclusion from *in camera* discussion with juror about defendant).

a nullity.[22] But improperly overruling a defendant's objection to a virtual plea that he bargained for does not result in a nullity; if unsupported by the emergency order, it results in regular trial error. Reversal should have required harm measured by the non-constitutional standard of TEX. R. APP. P. 44.2(b), as with other violations of other "waivable only" statutory plea rights.[23] Any violation was harmless for the same reason the right should be deemed purely procedural: appellant got everything he wanted and makes no other complaints about the proceeding.

VI. This case has importance beyond COVID-19.

Requiring an inmate to accept his desired plea via Zoom rather than be transported in and out of prison during a pandemic may not have been what the Legislature envisioned when it enacted Section 22.0035(b), but it is what the plain language of the statute covers. Moreover, this statute was used before COVID-19[24] and will be used again. A better understanding of what rights are "substantive" and which are "procedural" will be helpful generally. It will be especially helpful in the

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[22] The court of appeals curiously concluded that appellant's plea is voidable rather than void, slip op. at 5, but the latter term would have been more appropriate for the total lack of authority allegedly present in this case.

[23] *See*, *e.g.*, *Davison v. State*, 405 S.W.3d 682, 687-88 (Tex. Crim. App. 2013) (errors in Art. 26.13 admonishments subject to Rule 44.2(b)). Even the total exclusion from a proceeding framed as a constitutional violation is subject to harmless error review. *Rushen v. Spain*, 464 U.S. 114, 119-20 (1983) (exclusion of defendant from *ex parte* discussion between judge and juror subject to harmless error review).

[24] *Interest of M.T.R.*, 579 S.W.3d 548, 566 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (holding parental-rights termination trial was timely due to Supreme Court order suspending deadlines pursuant to its authority under Section 22.0035(b)).

context of prison pleas because virtual pleas are always an option and state-wide emergencies of all types present unique challenges to special prosecution.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review, reverse the decision of the court of appeals, and affirm appellant's bargained-for conviction.

Respectfully submitted,

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool the applicable portion of this document contains 1,893 words.

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on March 23, 2021, the State's Petition for Discretionary Review was filed and served electronically on the parties below:

Melinda Fletcher
Special Prosecution Unit
P.O. Box 1744
Amarillo, Texas 79105

John Moncure
State Counsel for Offenders
P.O. Box 4005
Huntsville, Texas 77342-4005

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney

APPENDIX

Opinion filed March 11, 2021

In The

Eleventh Court of Appeals

No. 11-20-00148-CR

ELUID LIRA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 259th District Court
Jones County, Texas
Trial Court Cause No. 012008

M E M O R A N D U M O P I N I O N

Appellant, Eluid Lira, entered into a plea-bargain agreement, pleaded guilty to the offense of assault on a public servant, and pleaded true to an enhancement allegation. The trial court convicted Appellant, found the enhancement allegation to be true, and assessed punishment pursuant to the terms of the plea agreement at imprisonment for eight years in the Institutional Division of the Texas Department of Criminal Justice and a fine of $5,000. In his sole issue on appeal, Appellant asserts

that he had a statutory right to enter his guilty plea in open court and that his right to do so was a substantive right and was therefore not subject to the Texas Supreme Court's emergency orders authorizing a trial court to modify or suspend any and all procedures. We agree with Appellant and, accordingly, reverse the judgment of the trial court.

Appellant's contention on appeal is that the trial court erred when it acted under the guise of the emergency orders issued by the Texas Supreme Court in response to the COVID-19 pandemic and required Appellant's plea hearing to be conducted via a Zoom videoconference. *See Seventeenth Emergency Order Regarding COVID-19 State of Disaster*, 609 S.W.3d 119 (Tex. 2020). Prior to the plea hearing, Appellant had filed a motion to rescind the order setting his case on a Zoom videoconference plea docket. Appellant indicated that he did not consent to the conducting of the plea hearing via Zoom or by other videoconferencing methods. Appellant requested a continuance until he could appear in court in person and in the physical presence of his attorney. Appellant asserted in his motion that requiring the plea hearing to be conducted via videoconference violated his rights to counsel and to a public trial and was contrary to state law, particularly Article 27.18 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 27.18(a) (West Supp. 2020).

Appellant renewed his objections at the outset of the plea hearing. The trial court overruled Appellant's motion and objections and proceeded with the plea hearing via videoconference. Appellant was incarcerated at the Allred Unit at the time of the plea hearing and appeared via Zoom. Appellant's attorney, who was not present with Appellant at the prison unit, also appeared via Zoom. Before Appellant entered his guilty plea, the trial court and the attorneys discussed the preservation of Appellant's right to appeal the matters that he had presented in his motion. Appellant pleaded guilty subject to the reservation of his right to appeal. The trial court

certified that, even though this was a plea-bargain case, it had given Appellant permission to appeal.

The above-referenced Seventeenth Emergency Order was in effect at the time of the plea hearing. That order provided in part as follows:

> 3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent:
>
> a. except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than September 30, 2020;
>
> b. [relates to Family Code and is not relevant here].
>
> c. Allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means[.]

Seventeenth Emergency Order, 609 S.W.3d at 120. The order was enacted pursuant to the authority granted to the supreme court in Section 22.0035(b) of the Government Code. *Id.* at 120; *see* TEX. GOV'T CODE ANN. § 22.0035(b) (West Supp. 2020). Section 22.0035(b) provides: "Notwithstanding any other statute, the supreme court *may modify or suspend procedures* for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor. . . ." (emphasis added).

Although Paragraph 3(c) appears on its face to authorize a trial court to require any party to participate in a proceeding via videoconferencing, we cannot hold that a defendant in a criminal case can be required, pursuant to the Seventeenth Emergency Order, to appear via videoconferencing over the defendant's objection. As asserted by Appellant and as recently determined by the Court of Criminal Appeals, neither Section 22.0035(b) nor the Seventeenth Emergency Order purports

to authorize a court to modify *substantive* rights. *In re State ex rel. Ogg*, No. WR-91,936-01, 2021 WL 800761, at *3 (Tex. Crim. App. Mar. 3, 2021) (orig. proceeding). According to the court in *Ogg*, Section 22.0035(b) and the Seventeenth Emergency Order both "address *procedural* matters." *Id.* (emphasis added). In *Ogg*, the State refused to consent to the defendant's waiver of a jury trial, but the trial court, citing the Texas Supreme Court's COVID-19 emergency order, nonetheless set the case for a bench trial. *Id.* at *1. The State sought mandamus relief, which the Court of Criminal Appeals conditionally granted. *Id.* at *1, 4. The Court of Criminal Appeals held that the emergency order did not "purport to authorize courts to modify substantive rights" and did not confer authority on the trial court to conduct a bench trial in violation of Article 1.13 because the consent requirement of Article 1.13 was "not merely procedural." *Id.* at *4; *see* CRIM. PROC. art. 1.13(a).

A defendant's right to appear in person in open court is not merely a procedural matter but, rather, is a substantive right provided for by statute. The Texas Code of Criminal Procedure provides that a defendant in a criminal prosecution (other than one involving the possibility of the death penalty) has the right, upon entering a plea, to waive the right of trial by jury (1) *if* the waiver is made in person by the defendant in open court with the consent of the prosecutor and the trial court or (2) *if* the provisions of Article 27.19 have been met. CRIM. PROC. art. 1.13(a). Article 27.19, in turn, provides that a court shall accept a guilty plea from a defendant who is confined in a penal institution if the plea is made in accordance with Article 27.18. *Id.* art. 27.19(a)(1). Article 27.18 permits a court to accept a defendant's "plea or waiver by videoconference" if certain conditions are met. *Id.* art. 27.18. One such condition is that the defendant and the prosecutor "file with the court written consent to the use of videoconference." *Id.* art 27.18(a)(1).

In the case before us, that statutory condition was not met. Appellant did not consent to the use of videoconference. In fact, he specifically objected to its use and

cited Article 27.18. Like the consent requirement involved in *Ogg*, the consent requirement in Article 27.18 is not merely procedural. Therefore, the Seventeenth Emergency Order did not alter or affect Appellant's statutory right to be personally present at his guilty-plea hearing, to enter his plea in person and in open court, and to refuse to consent to the disposition of his case via a videoconference hearing. *See Ogg*, 2021 WL 800761, at *3. Because the condition set forth in Article 27.18(a)(1) was not met, the trial court was not authorized to accept Appellant's guilty plea. *See id.* at *3–4. Furthermore, because the trial court was not authorized to accept Appellant's guilty plea, that plea is voidable. *See Davis v. State*, 956 S.W.2d 555, 557–58 (Tex. Crim. App. 1997); *see also Ogg*, 2021 WL 800761, at *3 (a judge's lack of authority may invalidate the proceeding itself); *Lilly v. State*, 365 S.W.3d 321, 328, 333 (Tex. Crim. App. 2012) (holding that issue related to failure to hold a public trial was preserved for review despite guilty plea and that judgment should be reversed and cause remanded for a new trial). We sustain Appellant's sole issue.

Accordingly, we reverse the judgment of the trial court and remand the cause to the trial court for further proceedings.

JOHN M. BAILEY
CHIEF JUSTICE

March 11, 2021

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Trotter, J., and Wright, S.C.J.[1]

Williams, J., not participating.

[1]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

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Stacey Soule on behalf of John Messinger
Bar No. 24053705
information@spa.texas.gov
Envelope ID: 51752163
Status as of 3/26/2021 9:57 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Melinda Fletcher		mfletcher@sputexas.org	3/23/2021 4:05:14 PM	SENT
John Moncure		john.moncure@scfo.texas.gov	3/23/2021 4:05:14 PM	SENT